IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-461

GRAYSON DIGGS,)
)
Petitioner,)
)
-vs-)
)
UNITED STATES)
OF AMERICA,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE SEVENTH CIRCUIT

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I N D E X

TABLE OF CASES

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OCTOBER TERM, 1977

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GRAYSON DIGGS,)
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Petitioner,)
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-VS-)
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STATE OF INDIANA,)
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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

Grayson Diggs, by his attorney, Ferd Samper, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, in affirming the judgment of the United States District Court for the Southern District of Indiana, the Honorable Cale Holder, presiding, upon his conviction for violation of Title 18 of the United States Code, section 1621.

OPINION OF THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

The above opinion has not been officially reported, but a copy is reproduced herein as Appendix "A" to this petition.

JURISDICTION

1. The judgment of the United States Court of Appeals was entered on August 1, 1977.

2. A timely Petition for Rehearing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit on August 18, 1977.

3. The Petition for Rehearing was denied on August 25, 1977.

4. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, section 1254 (1),

and Rule 19 (b) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Did the evidence submitted by the United States of America satisfy the "two-witness" rule in perjury trials, or did the trial and appellate courts improperly define the above rule in a manner inconsistent with prior definitions from this Court and other Courts of Appeals?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States reads as follows:

> Criminal actions-Provisions concerning-Due process of law and just compensation clauses. --No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This cause was commenced by the return and filing of an indictment on April 21, 1976. The indictment was for a charge of perjury in violation of Title 18, United States Code, Section 1621. The indictment alleged that the defendant, Grayson Diggs, on the 25th day of March, 1976, perjured himself while testifying before the Grand Jury of the United States of America duly impaneled and sworn in the United States District Court for the Southern District of Indiana.

The case was submitted for a trial by jury and the defendant was found guilty as charged. The Court entered judgment on said verdict and ordered the defendant

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STATEMENT OF THE CASE

This cause was commenced by the return and filing of an indictment on April 21, 1976. The indictment was for a charge of perjury in violation of Title 18, United States Code, Section 1621. The indictment alleged that the defendant, Grayson Diggs, on the 25th day of March, 1976, perjured himself while testifying before the Grand Jury of the United States of America duly impaneled and sworn in the United States District Court for the Southern District of Indiana.

The case was submitted for a trial by jury and the defendant was found guilty as charged. The Court entered judgment on said verdict and ordered the defendant

committed to the custody of the Attorney General for imprisonment for a period of one (1) year.

The evidence disclosed that there was a lawfully impaneled Grand Jury for the United States District Court for the Southern District of Indiana. This Grand Jury was investigating alleged criminal activities of one John Lind, M.D. Among the alleged criminal activities was the question of ownership by John Lind of an illegal weapon or weapons. On March 25, 1976, the defendant, Grayson Diggs, appeared before the Grand Jury and was administered an oath by the foreman, Mr. Hoon. The defendant was questioned many times about his knowledge of a .45 caliber Thompson machine gun that Dr. Lind allegedly owned. He was also asked whether or not he took a cardboard box with a machine gun in it

to Halbert Vanover's house. Grayson Diggs denied seeing a machine gun or delivering it to Vanover.

Halbert Vanover is married to one of Grayson Diggs' sisters. He testified that on November 8, 1975, at about three o'clock p.m. he saw Diggs at his (Vanover) house. His wife and his granddaughter were also at home when Diggs and his wife arrived. After the ladies left the house, Vanover testified that Diggs told him, "I brought a machine gun out here. John wants you to keep it while we're gone, keep somebody from stealing it." They went to Diggs' truck and Vanover carried a box into the house and put it in the utility room. Vanover did not look in the box until the next day, Sunday evening. He and a friend, Fred Cannon, opened the box and saw the machine gun.

Vanover then testified that he took the box and alleged machine gun back to Diggs later that evening but not did not discuss the matter with Diggs or his wife. He has not seen the gun or box since then and has not talked to Diggs.

Olive Vanover, the wife of Halbert Vanover, testified that Diggs and his wife came over to their house between two and four o'clock on November 8, 1975. They stayed about one hour. She did not see Diggs deliver the alleged box in question. She, sometime later, saw a pasteboard box and looked into it with her daughter, Janet Flamion and her granddaughter. She testified she saw some parts of a gun.

Janet Flamion is the daughter of Mr. and Mrs. Vanover. She testified that on November 8, 1975, at about twelve or one

o'clock in the afternoon she went to her parent's house and was there about a half hour or forty-five minutes. She saw a cardboard box and looked into in with her mother and daughter. They saw a pamphlet that said "submachine gun" and several parts.

Fred Cannon was at Vanover's house sometime around November 8 or 9, 1975. He could not remember the exact date. He saw a submachine gun in a brown paste-board box.

Ted Dorsey was at Dr. John Lind's house in the fall of 1972 and was shown a machine gun by Dr. Lind.

Pamela K. Enyeart was with her brother, Gary Lake, and Dr. Lind on March 9, 1975, and saw in Dr. Lind's possession what appeared to be a machine gun.

Jimmy K. Canter executed a warrant

to search Diggs' house on November 20, 1975. No submachine gun was found at Digg's residence.

ARGUMENT

Petitioner believes the Seventh Circuit Court of Appeals has overlooked or misapprehended two (2) points presented in his appeal.

a. The "two-witness rule", the meaning of which is central to this appeal, has not been consistently applied by the various Federal Courts. The Seventh Circuit Court of Appeals recognized the lack of consistency but dismissed the differences as "a matter of semantics and a slight difference in emphasis." The Seventh Circuit Court of Appeals obviously recognized a dissimilarity in the treatment the various circuit courts of appeals award the "two-witness rule". These inconsistencies necessarily result in different treatment

for individuals who are indicted and brought to trial in different regions of this country. Because of the differences in treatment, individuals in one region might be benefited by the local interpretation as compared to a criminal defendant accused of a identical crime in a neighboring region -- considering the situation at bar, it is obviously arguable that one citizen is burdened rather than the other citizen being benefited. Regardless, it is only proper that both individuals face identical quantums of evidence before their freedom is denied.

The Seventh Circuit Court of Appeals found "[T]he two-witness rule is thus satisfied when there is direct testimony from one witness and additional independent evidence so corroborative of the direct testimony that the two when considered together are sufficient to establish the

falsity of the accused's statements under oath beyond a reasonable doubt". Petitioner contends this interpretation is contrary to previously established case law. We agree there may be direct evidence of guilt and then supportive circumstantial evidence. However, the supportive circumstantial evidence must have independant probative value tending to demonstrate the guilt of the accused. If a one-witness rule were applied, the circumstantial evidence would have to equal the standard of being sufficient in its own right to indicate a wrongful statement on the part of the Defendant. The Seventh Circuit Court of Appeals ignored decisions cited in the BRIEF OF THE DEFENDANT-APPELLANT which had previously held that corrabative evidence must independently establish the perjury charged. United States v. Neff, 212 F. 2d 297, 307

(1954).

b. Petitioner secondly contends the Seventh Circuit Court of Appeals erred in finding that the evidence presented at trial was sufficient to satisfy this Court's interpretation of the two-witness rule. We do not speak to that evidence which supports witness Vanover's statement that a contraband machine-gun was in his home on the date in question. There may well have been such a weapon. However, there was no evidence which indicated the Petitioner brought the weapon to that location. It was the denial of the transportation which was supposed to have been the perjurious statement.

At the close of the government's evidence, Petitioner moved for a judgment of acquittal because the government had not, as a matter of law, presented a prima

facie case. The "Two Witness Rule" was affirmed by the Supreme Court of the United States in Weiler v. United States 65 S.Ct. 548, 323 U.S. 606, 89 L.Ed. 495, 156 A.L.R. 496 (1945). A conviction on a charge of perjury brought under 18 U.S.C. §1621 can not be obtained soley upon the uncorroborated testimony of one witness. In United States v. Weiner 479 F.2d 923 (1973), the Court stated at page 926, "The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of quality to assure that a guilty verdict is solidly founded".

The Petitioner submits to this Court that the government failed to satisfy this requirement on its case in chief and that the trail court erred in denying the Defendant's motion for

judgment of acquittal at the close of the government's case in chief.

"Before submitting a perjury case to the jury, the court must determine whether the quantitative rule of evidence has been satisfied. Where corroborative evidence is offered, the court must rule, as a matter of law, whether it is sufficient - that is, whether the corroborative evidence, if true, substantiates the testimony of the single witness who has sworn to the falsity of the alleged perjurious statement -, the credibility of the corroborative testimony is exclusively for the jury." United States v. Neff, 212 F.2d 297 (1954).

In the instant case, the government presented only one witness, Halbert Hanover, who testified directly to the false statements of the Petitioner. Vanover was unequivocable in his testimony that Diggs

brought over a box with a machine gun in it on November 8, 1975, at about three o'clock p.m. (Tr. 74, 75, 76) The Petitioner does not dispute this fact. However, the Petitioner does argue here that the government failed to present corroborative evidence sufficient to satisfy the requirement of the "Two Witness Rule".

"When the courts speak of corroborative evidence, they mean evidence aliunde - evidence which tends to show the perjury independently." United States v. Rose 215 F.2d 617 (1954). In Neff, supra, the court stated at page 307, "Where the government seeks to establish perjury by the testimony of one witness and corroborative evidence, the latter must be independent of the former and inconsistent with the innocence of the Defendant".

The court in Neff reversed the conviction stating at page 307, "The 'corroborative' evidence did not independently establish the perjury charged in Count I."

It is clear, therefore, that the corroborative evidence must meet a two-fold test to determine if it is sufficient as a matter of law. Such evidence must be independent of the testimony of the one witness. The corroborative evidence must also be totally inconsistent with the innocence of the Defendant.

The mere fact that the government presents other witnesses whose testimony raises the possibility of the perjury or corroborates only part of the primary testimony is not sufficient. In Paternostro v. United States, 311 F.2d 298 (1962), the issue was whether or not the Defendant lied about receiving graft money from a man named Bray. At the trial, Bray

testified that he gave money in a brown envelope to the Defendant. The corroborative witness, Gervais, did not see the Defendant receive the envelope, but he did testify about a brown envelope with money in it. The court rejected this as corroborative evidence and reversed.

In United States v. Thompson, 379 F2d 625 (1967), the court reversed the conviction of perjury stating that the corroborative evidence did not negate other possibilities. In Thompson the issue was whether or not the Petitioner, while in jail, had asked a policeman to get a lawyer. The policeman testified he did not and two FBI agents merely corroborated the fact that they saw Petitioner on the day in question, at the jail in question, and that the policeman was there.

A close perusal of the evidence

presented other that that of Vanover is necessary for the determination of this appeal. The evidence presented by Keith Smith (Tr. 13), James Hoon (Tr. 20), Charles Roche (Tr. 33), and Delores Hampton (Tr. 40), was of a technical nature only to prove the lawful Grand Jury, oath, testimony by the Petitioner before the Grand Jury, and materiality. They in no way can be considered corroborative evidence. Robert T. Crofford (Tr. 142) and Jimmy K. Canter (Tr. 151) testified that a search warrant was issued for the search of Petitioner's house and that, at its execution, the mysterious box and machine gun were not found. This evidence, rather than being corroborative, was exculpatory in nature.

Ted Dorsey testified that in the fall of 1972 he was shown a machine gun by Dr. John Lind. (Tr. 133) This testimony in

no way corroborates the testimony of Vanover, but could be considered in determining the materiality of Diggs' testimony before the Grand Jury. The testimony of Pamela K. Enyeart, which states that she saw Dr. Lind with a machine gun on March 9, 1975, could, likewise, not be considered corroborative. (Tr. 137)

Upon reviewing the evidence by this process of elimination, the government is left with the testimony of three witnesses for corroboration of Vanover's testimony. Again, the Petitioner wants to emphasize the words independent and inconsistent with innocence . Did the testimony of these three witnesses negate other possibilities? We must not forget that the Petitioner was charged with lying about his bringing or delivering a

box with a machine gun in it to Vanover's house on November 8, 1975. The mere fact that Lind had a machine gun or that there was a box with a machine gun in it at Vanover's house is of no consequence.

Fred E. Cannon was a good friend of Vanover. He was at Vanover's house sometime around November 8 or 9, 1975. He did not remember the exact date. (Tr. 122) Cannon testified that he saw a submachine gun ("grease gun") in a brown pasteboard box. (Tr. 124) He did not testify that he saw Diggs with the box and gun. Cannon's testimony does not in any way corroborate that Diggs delivered the box and gun. His testimony does not negate other possible explanations for the presence of the box and gun.

No witness supported Vanover's statement that Petitioner had transported the weapon. The Seventh Circuit Court of

Appeals found that witness Flamion gave credence to the transportation testimony from Vanover. The Seventh Circuit Court of Appeals found "...[s]he (Flamion) testified that in a subsequent conversation, Diggs said with reference to the box that he would have thrown it into the ocean had he known the trouble it would cause". (Opinion, p.3) Reviewing pages 113 and 114 from the trial transcript, it is apparent witness Flamion does relate a conversation she had with Diggs. However, her testimony indicates that Diggs consistently denied possessing either the weapon in question or the box in which it was supposedly contained.

Further examination of Flamion's testimony begs certain questions regarding her referent in the conversation she has with Diggs. Her testimony at pages 105 and 106 of the trial transcript indicates

her visit to Vanover's home was fully two or three hours before Diggs made his arrival. She observed two packages ccntaining weapon parts and ammunition before Diggs allegedly delivered them.

During the conversation Flamion recalls during her later testimony, it should be noted that the conversation is replete with unclear referents. She and Diggs talk in terms of "its" and not specific items. During the conversation Diggs refused to acknowledge any gun, and apparently refused to discuss a box either. Diggs then apparently talks of wishing he had thrown some object in the ocean, but he never clearly indicated that he ever possessed the "it" he would have thrown away. It should be remembered that Diggs never denied taking ammunition and some other objects in a medical type bag to

Vanover's home, yet the testimony of Flamion does not clearly allude to any particular package and any particular items.

Clearly, the testimony of Flamion must be taken out of context and tortured to support the testimony of the direct-witness, Vanover. Although the credibility of the witness is a question for the jury to determine, this Court does have some small part in determining when credibility might be misplaced. As the Seventh Circuit Court of Appeals has stated, the independent corroborating evidence must be trustworthy enough to convince the jury that what the principal witness said was correct. (Opinion, p.6), citing Weiler v. United States, 323 U.S. 606, 610 (1945) It is upon Flamion's testimony the sufficiency of the evidence must rest. An analysis of her contribution

to the United State's case reveals the weakness of her contribution.

Excluding the testimony of Halbert Vanover, the sum-total of the non-technical inculpatory evidence indicates Petitioner went to Vanover's home on November 8, 1975, at 3:00 p.m. Witnesses saw a box containing machine gun parts at Vanover's home during the weekend of November 8, 1975, but the box was seen both before and after Petitioner's visit. Looking at this evidence alone, one can not conclude Petitioner delivered the box. As independent corroborative evidence must take the place of a witness' direct testimony, and must be of equal strength, and if in this cause we had a "one-witness" rule -- Halbert Vanover not being available -- the testimony of the government witnesses would not be sufficient to sustain a

conviction. The circumstantial evidence presented is not inconsistent with the innocence of Petitioner, and does not negate other possibilities of explanations.

CONCLUSION

WHEREFORE, for the above reasons, the Petitioner prays that the decision of the trail court be reversed, the judgment be set aside and the Petitioner discharged.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 76-2039

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GRAYSON DIGGS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 76-59-Cr—**Cale J. Holder**, *Judge*.

ARGUED JUNE 14, 1977—DECIDED AUGUST 1, 1977

Before SWYGERT, SPRECHER and WOOD, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Defendant-appellant Grayson Diggs appeals his conviction by a jury for perjury in violation of 18 U.S.C. § 1621. Defendant's sole contention is that the Government's evidence was insufficient to satisfy the so-called "two-witness" requirement for perjury convictions. We find the requirement to have been met and affirm the conviction.

I

In the spring of 1976 a lawfully impaneled grand jury of the district court for the Southern District of Indiana was investigating the alleged criminal activities of John D. Lind, including his ownership of illegal weapons. In the course of the investigation Diggs appeared on March 25, 1976 before the grand jury and testified under oath. In response to questions concerning his knowledge of a machine gun owned by Lind and whether he had taken a carboard box containing a machine gun to the home of Halbert Vanover, Diggs denied seeing or knowing anything about such a gun. He also denied delivering the carton to Vanover.

On April 21, 1976 and subsequent to this testimony, Diggs was indicted for perjury in violation of 18 U.S.C. § 1621.[1] The indictment charged that defendant's testimony before the grand jury was not true and that he knew it to be false since he had delivered to Vanover a box containing a machine gun on November 8, 1975.

At the perjury trial Vanover testified that on November 8, 1975, Diggs came to his home and told him that he had brought a machine gun which Lind wanted Vanover to keep for him. Vanover further testified that he then carried a box from Diggs' truck to the house and that, upon opening the carton the next evening in the presence of a friend, he found a machine gun inside. Vanover stated that he returned the box and gun to Diggs later that evening.

Vanover's friend, Fred Cannon, corroborated Vanover's testimony by stating that he had looked at the box that evening and had seen a gun and an arms manual inside. In addition, other corroborative testimony was offered. Mrs. Olive Vanover, the defendant's sister, testified that Diggs had visited their home

[1] 18 U.S.C. § 1621 provides in part:

> Whoever, having taken an oath before a competent tribunal, . . . in any case in which a law of the United States authorizes an oath to be administered, that he will testify, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury.

on the afternoon of November 8. Although she did not actually see it carried in, she later noticed a box which had not been in the house prior to defendant's visit. Mrs. Vanover's daughter, Janet Flamion, was present when she examined the box and found what she described as assorted metal parts, one of which she thought resembled the stock of a gun. Flamion also testified that she had looked at the contents of the box with Mrs. Vanover that day, observing that there were metal parts, an ammunition clip, and a pamphlet on which were printed the words "submachine gun," a drawing of a machine gun, and the name "John Lind." Moreover, she testified that in a subsequent conversation, Diggs said with reference to the box that he would have thrown it into the ocean had he known the trouble it would cause.

On September 10, 1976 the jury found defendant Diggs guilty of perjury and judgment was entered accordingly. Diggs filed this appeal shortly thereafter.

II

It is defendant's contention that the Government failed as a matter of law to provide sufficient evidence of perjury to support the guilty verdict. The argument is based on the two-witness rule, which in essence states that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." *Hammer v. United States*, 271 U.S. 620, 626 (1926). The policy behind this rule is that a conviction for perjury ought not to rest solely on one man's oath against that of another, and on "the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted." *Weiler v. United States*, 323 U.S. 606, 609 (1945).

Although the two-witness rule is "deeply rooted in past centuries," *Weiler, supra* at 608-09, it is not of constitutional dimensions. Indeed, Congress has seen fit to abolish it in cases involving false declarations under oath before a grand jury or court which are prosecuted

under 18 U.S.C. § 1623.[2] The constitutionality of this legislative abrogation of the two-witness rule has been upheld by all courts which have considered the matter. *See, e.g., United States v. Lee*, 509 F.2d 645 (2d Cir. 1975); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974); *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973); *United States v. Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Ceccerelli*, 350 F. Supp. 475 (W.D. Pa. 1972); *United States v. McGinnis*, 344 F. Supp. 89 (S.D. Tex. 1972).

This legislative abolition of the rule, however, does not directly affect the case at bar. The language of section 1623 abolishing the two-witness rule clearly applies only to prosecutions brought under that section. In cases brought under section 1621 the two-witness rule still stands. Although the defendant's act of perjury before a grand jury fell within the requirements for prosecution under section 1623 and its lesser quantitative evidentiary burden, section 1621 applies as well, and the Government chose to seek an indictment only under the latter section.[3]

[2] 18 U.S.C. § 1623(e) provides:

> Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

[3] Not only does section 1623 carry with it a lesser burden of quantitative proof, but it also provides for a greater maximum sentence. Whereas 18 U.S.C. § 1621 has a maximum sentence of five years' imprisonment or a $2,000 fine, or both, 18 U.S.C. § 1623(a) provides for a fine of not more than $10,000 or imprisonment for not more than five years, or both.

While we fail to understand this course of action, we need not concern ourselves with its consequences, for we find that there was sufficient evidence to convict under section 1621 and the two-witness rule. We note here without expressing approval that one court, faced with a similar situation, handled the matter quite differently. In *United States v. Clizer*, 464 F.2d 121 (9th Cir. 1972), the court had before it an indictment charging the defendant with perjury before a grand jury under the provisions of section 1621 rather than section 1623. Noting that it doubted the conviction could stand if the two-witness rule were applied, the court merely stated that the Government, despite its reference to section 1621, had in fact charged the defendant with a violation of section 1623, and went on to dispose of the case by applying the lesser evidentiary requirements of section 1623(e).

III

As currently applied the two-witness rule does not literally require the direct testimony of two separate witnesses, but rather may be satisfied by the direct testimony of one witness and sufficient corroborative evidence. *United States v. Weiner*, 479 F.2d 923, 926 (2d Cir. 1973); *see Weiler v. United States*, 323 U.S. at 610. While this interpretation is not seriously questioned, there is an apparent division among the circuits over the precise wording of the rule to be applied in determining the sufficiency of the corroborative evidence.

In analyzing the various expressions of the rule and their application, we agree with the Second Circuit that "[t]he division in the Circuits, judged by its results, appears to be a matter of semantics and a slight difference in emphasis." 479 F.2d at 927. No wording of the rule requires the corroborative evidence to be sufficient for conviction; nor does any phrasing permit conviction where the corroboration consists of merely peripheral testimony not tending to show the falsity of the accused's statements while under oath.[4]

[4] In *Weiler* the Supreme Court said that two elements must enter into any determination of whether corroborative evidence is sufficient: [(1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy." 323 U.S. at 610.

In seeking to implement these guidelines the circuits have developed and applied various wordings of the standard. *See United States v. Hiss*, 185 F.2d 822, 824 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) (independent proof of facts inconsistent with the innocence of the accused); *McWhorter v. United States*, 193 F.2d 982 (5th Cir. 1952); *United States v. Neff*, 212 F.2d 297 (3d Cir. 1954); *United States v. Thompson*, 379 F.2d 625 (6th Cir. 1967); *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955), *cert. denied*, 350 U.S. 954 (1956) (tends to establish the defendant's guilt, and if such evidence together with the direct evidence is inconsistent with the innocence of the defendant); *Brightman v. United States*, 386 F.2d 695 (1st Cir. 1967). Recently the Second Circuit interpreted the *Hiss* requirement "to mean no more than that such evidence must tend to substantiate that part of the testimony of the principal prosecution witness which is material in showing that the statement made by the accused under oath was false." *United States v. Weiner*, 479 F.2d 923, 927-28 (2d Cir. 1973).

The two-witness rule is thus satisfied when there is direct testimony from one witness and additional independent evidence so corroborative of the direct testimony that the two when considered together are sufficient to establish the falsity of the accused's statements under oath beyond a reasonable doubt. "Independent" evidence in this context means evidence coming from a source other than that of the direct testimony. *See McWhorter v. United States*, 193 F.2d 982, 985 (5th Cir. 1952); *United States v. Neff*, 212 F.2d 297, 307 (3d Cir. 1954). This independent corroborating evidence must be trustworthy enough to convince the jury that what the principal witness said was correct, the ultimate determination of its credibility being an exclusive function of the jury. *Weiler v. United States*, 323 U.S. at 610.

As in all criminal cases, the burden on the Government against which its evidence must be judged is that of proving the defendant guilty beyond a reasonable doubt. The two-witness rule in perjury cases merely imposes an evidentiary minimum required to meet this burden as a matter of law. The rule focuses on the totality of the Government's evidence in order to assure a sufficiency necessary to fulfill its underlying policy that perjury convictions not be based merely on an "oath against an oath."

IV

We find that the evidence presented by the Government in this case satisfies the two-witness rule and was sufficient for the jury to convict Diggs of perjury. The testimony of three independent witnesses served to corroborate that of Vanover. Cannon testified that he looked at the box described by Vanover as the one delivered to his home by the defendant, and that he found a gun and an arms manual inside. Mrs. Vanover placed Diggs at her home the day of the delivery and testified that she later found a box containing metal parts which had not been there prior to defendant's earlier visit. Flamion not only testified to the presence of the box in the Vanover home and to its contents, but also related a conversation

which she had with the defendant in which he said he would have thrown the box into the ocean had he known the trouble that would result. This was evidence which corroborated significant aspects of Vanover's principal testimony, sufficient, if believed, to convince a jury that Vanover's testimony was correct and that defendant was therefore guilty of perjury. This being so, the two-witness rule was satisfied.

The judgment of conviction is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit